IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No.17 of 2005
AND
Criminal Appeal No.18 of 2005
AND
Criminal Appeal No.19 of 2005
AND
Criminal Appeal No.21 of 2005
AND
Criminal Appeal No.22 of 2005
AND
Criminal Appeal No.23 of 2005
AND
Criminal Appeal No.24 of 2005
AND
Criminal Appeal No.25 of 2005
AND
Criminal Appeal No.95 of 2005

Date of decision :-14.06.2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-14.06.2007 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No.17 of 2005

Chander S/o Shri Soma
R/o village Daduvass
Police station Bhagwanpur
District Haridwar

.....Appellant

Versus

State .....Respondent

AND

Criminal Appeal No.18 of 2005

Satish S/o Shri Amar Singh
R/o village Daduvas
Police Station Bhagwanpur
District Haridwar ....Appellant

Versus

State ... Respondent

AND

Criminal Appeal No.19 of 2005

1. Salekh S/o Birma
2. Pratap S/o Dhyan Singh
3. Karan Singh S/o Balwant Singh
4. Manga S/o Lekhram
5. Tirath S/o Kuradi
6. Bijander S/o Ratiram
7. Nathu S/o Mohar Singh
   All 1 to 7 R/o village Dadubas
   P.S. Bhagwanpur, District Haridwar
8. Sushil S/o Makhan Singh
   R/o village Madu Wala Fathepur
   P.S. Fathepur, District Haridwar

..Appellants

Versus

State ...Respondent

AND

Criminal Appeal No.21 of 2005

Manga @ Man Singh S/o Jai Singh
R/o village Daduvas
Polcie Station Bhagwanpur
District Haridwar ...Appellant

Versus

State ...Respondent

AND

Criminal Appeal No.22 of 2005

Piyara S/o Shri Soma
R/o village Daduvas
Police Station Bhagwanpur
District Haridwar .....Appellant

Versus

State ...Respondent

AND

Criminal Appeal No.23 of 2005

Soma S/o Jiwan
R/o village Daduvas
Police Station Bhagwanpur
District Haridwar .....Appellant

Versus

State ...Respondent

AND

Criminal Appeal No.24 of 2005

Rakesh S/o Jai Singh
R/o village Daduvas
Police Station Bhagwanpur
District Haridwar .....Appellant

Versus

State ...Respondent

AND

Criminal Appeal No.25 of 2005

Radha S/o Shri Soma
R/o village Daduvas
Police Station Bhagwanpur
District Haridwar .....Appellant

Versus

State ...Respondent

AND

Criminal Appeal No.95 of 2005

Karan Singh s/o Shri Balwant Singh
R/o village Daduvas
Police Station Bhagwanpur
District Haridwar .....Appellant

Versus

State ...Respondent

Delivery of Judgment 14th June, 2007

Mr. S. K. Agarwal, senior Advocate with Rajendra Singh Advocate for the appellants-Chander, Satish, Manga @ Man Singh, Piyara & Radha.
Mr. Nand Prasad, Advocate for the appellant-Rakesh.

Mr. S. K. Agarwal, senior Advocate with Mr. Lok Pal Singh and Mr. Ajay Veer Pundir Advocates for the appellant-Karan.
Mr. S. K. Agarwal, senior Advocate with Mr. B.M. Pingal, Mr. Udyog Shukla, Mr. Manish Arora, Ms. Krishi Shukla and Mr. M.S. Tyagi Advocates for the appellant-Salekh, Pratap, Karan Singh, Manga, Tirath, Bijander, nathu & Sushil.
Mr. G.S. Sandhu, Govt. Advocate for the respondent-State.

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

Since all criminal appeals have arisen out of the common impugned judgment and order dated 01.02.2005 passed by the Addl. Sessions Judge, Haridwar in S.T. No.156/2002 State Vs. Soma and others, hence all these appeals have been heard together and are being disposed of by this common judgment. By the impugned judgment and order, the appellants-Soma, Chander Piyara, Radha, Bijander, Manga alias Man Singh, Rakesh, Pratap, Satish, Salekh, Karan Singh, Manga S/o Lekhram, Nathu, Tirath and Sushil were convicted under section 302 IPC read with 149 IPC and each of them were sentenced to undergo imprisonment for life and to pay a fine of Rs.5000/-. The appellants were also convicted under section 307 IPC read with 149 IPC and each of them were sentenced to undergo imprisonment for seven years and to pay a fine of Rs.3000/-. The appellants were further convicted and each of them were sentenced to undergo for one year and for six months and to pay fine of Rs.1000/- and Rs.500/- under section 148 IPC & 147 IPC respectively. All the sentences were to run concurrently. In default of payment of fine under section 302/149 IPC, each of the appellants were to undergo for further six months R.I. In default of payment of fine under section 307/149 IPC, the

appellants were to undergo for three months R.I. and in default of payment of fine under section 148 IPC the appellants were to undergo for two months R.I. In default of payment of fine under section 147 IPC, the appellants were to undergo for further one month R.I.

2. The facts, in nutshell, are that the informant Sajjad alias Kala is the resident of village Dadubas, P.S. Bhagwanpur, District Haridwar. The appellants Bijander and Tirath have fired gun shots upon the informant in the matter of Soma's daughter about two years ago from the date of incident and the said case was compromised in the court, due to this reason there was enmity between them. An incident of 'marpeet' took place between Pyara – son of Soma and Liyakat son of Noordin about four days ago from the date of incident with regard to the Metador (vehicle) charges and on the very next day at about 2pm the exchange of hot words took place between them. On 21.11.2001 Ayub - the brother of the complainant Sajjad @ Kala went to his filed situated near the river. The accused persons Soma, piyara, Chander and Radha came there and surrounded him, but he made his escape good from there. On the same day at about 10am soma, Piyara, Chander, Radha, Bijander, Tirath, Nathu, Manga S/o Jai Singh, Rakesh, Pratap, Satish, Salkh, Karan, Manga S/o Lekhram and Sushil armed with licensed guns and country- made pistols came near the house of the complainant. They abused the complainant party and challenged them to come out from the house. On this, the complainant and his family members alongwith the villagers tried to pacify them. But the accused persons fired indiscriminate gun shots towards

the house of the complainant, due to which Gayur, Ikraar, Qayum, Israar, Ayub, Arshad, Ashruff, Iltaaf, Hamid, Naseem and Smt. Mehmuda sustained gun shot injuries. Mehroof S/o Naazar sustained gun- shot injury on his chest and he succumbed to his injury at the spot. Injured persons were taken to Rookee Hospital for their medical treatment. The dead body of the deceased- Mehroof was lying at the spot. Thereafter, the FIR Ex. Ka. 1 was lodged in the police station by the informant Sajjad @ Kala on the same day at about 11:45 and a case was registered against the accused persons. On 24.11.2001 at about 4:30am the injured Ikraar Ali succumbed to his injuries and the complainant gave a report Ex.Ka.2 to that effect to the police station, Bhagwanpur. The Investigating Officer started the investigation and sent the dead body for postmortem. The Investigating Officer also recovered the guns. The I.O prepared the site plan. He also recorded the statement of the witnesses. After completing the investigation, the Investigating Officer submitted the chargesheet before the court.

3. After submission of chargesheet the appellants-accused were committed to the court of Sessions for trial and the trial court framed charges against the accused persons. They denied the charges levelled against them and claimed their trial.

4. The prosecution in support of its case examined as many as 13 witnesses, out of which, Gayur PW1, Sajjad @ Kala PW2, Ayub PW3, Ashraf PW4 are the injured eye witnesses of the incident. Dr. S. S. Lal PW5 has proved the postmortem report of the deceased-

Mehroof. Dr. D. D. Lumba PW6 has examined the injured Ikraar, Arshad, Naseem, Ashruff, Smt. Mehmuda, Iltaaf, Qayum, Ayub, Israar and Hamid. Dr. Ajay Agarwal PW7 has examined the injured Sajjad @ Kala. Dr. R. K. Pandey PW8 conducted the postmortem of the deceased-Ikraar. Dr. Yogesh Kumar PW9 (Radiologist) has proved the X-ray reports of the injured Ikraar, Israar, Hamid, Ashruff, Naseem, Arshad and Iltaaf. S.I. R. K. Awasthi PW10 prepared the panchnama of the deceased Mehroof and Ikraar. Constable Vipin Kumar Kaushik PW11 has proved the chick FIR Ex.ka.47. S.I. – R. P. Singh Panwar PW12 has proved that the report of the death of injured Ikraar was recorded in the G.D. Ex.ka.48. Jodh Singh Adhikari PW13 was the Investigating Officer of this case. After completing the investigation, he submitted the chargesheet against the accused persons.

5. The accused persons were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated that they have been falsely implicated in this case due to enmity and political reasons.

6. The learned trial court on appreciation of the evidence held the appellants guilty and convicted and sentenced them as mentioned above.

7. We have heard learned counsel for the appellants and learned Government Advocate for the respondent-state. Perused the record carefully.

8. At the outset, it needs to be mentioned here that it is not disputed that the deceased-Mehroof S/o Naazar

died on the spot on account of fire-arm injury sustained by him on the date of occurrence. Dr. S. S. Lal PW5, Medical Officer conducted the postmortem of the deceased-Mehroof on 22.11.2001 at 1:30A.M. The autopsy surgeon found the following ante-mortem injury on the person of the deceased-Mehroof:-

(i) Fire arm wound of entry 1cm x 1cm rounded in shape in front of left side of chest. 4cm away from left nipple at 10 o'clock position, margins inverted, blackening & tattooing present.

9. In the opinion of Dr. S. S. Lal PW5, Medical Officer, the death was caused due to shock and haemorrhage resulting from the ante-mortem fire-arm injury sustained by the deceased. The Medical Officer has also opined that the duration of the death was about half to one day back. He has proved the post mortem report Ex.Ka.3. Thus, it is amply established that deceased-Mehroof met a homicidal death on account of fire-arm injury sustained by him.

10. All the injured witnesses, including Ikraar Ali who died on 24.11.2001, were examined by Dr. D. D. Lumba PW6, Medical Officer of Roorkee Civil Hospital. The injured Ikraar Ali was medically examined on 21.11.2001 at 11:35 am and following injuries were found on his person:-

(i) Lacerated wound 1cm x 0.5cm x through and through left pinna back middle part. No blackening, scorching and tattooing seen around the wound.

(ii) Lacerated wound 1.0cm x 0.5cm x muscle deep tragus of left ear. No blackening, scorching and tattooing seen around the wound.

(iii) Lacerated wound 1.6cm x 1.0cmx depth not probed middle of chin lower part. No blackening, scorching and tattooing seen around the wound. Adv. X-ray and fresh in duration.

11. Considering the precarious condition of the injured-Ikraar Ali, he was referred to a higher center for treatment on 21.11.2001 at 12:10pm. He was taken to P.G.I., Chandigarh from where he was referred to A.I.I.M.S., New Delhi, In view of his precarious condition, the injured-Ikraar Ali was allowed to take him to his house. Thereafter, the injured Ikraar Ali died on 24.11.2001. Dr. R. K. Pandey PW8, Medical Officer conducted the postmortem of the deceased-Ikraar Ali on 24.11.2001 at 2:30pm and found the following ante-mortem injuries on the person of he deceased-Ikraar Ali:-

(i) Fire arm wound of entry 0.5cm x 0.08cm below in middle part of chin. Margins are incised. No blackening and tattooing seen around the wound, on explanation. Bullet traversed through brain substance, strike at occipital bone. There is fracture of occipital bone rebound through brain substance back of neck and recovered from space between C5 & C6 from muscle, fracture of C5 cervical vertebra.

(ii) Abrasion 1.5cm x 1cm on the left pinna of tragus.

12. In the opinion of Dr. R. K. Pandey PW8, Medical Officer, the death was caused due to haemorrhage and coma resulting from the ante-mortem fire-arm injury sustained by the deceased-Ikraar. The Medical Officer

has also opined that the duration of the death was about quarter to half day. Thus, it is amply established that deceased-Ikraar Ali met a homicidal death on account of fire-arm injury sustained by him.

13. It is also not disputed that the injured persons i.e. Gayur, Qayum, Israar, Ayub, arshad, Ashraf, Iltaaf Hamim, Nasim and Smt. Mahmuda have sustained injuries on their persons on the date of occurrence. Dr. D.D. Lumba PW6 has examined all the aforesaid injured person. He examined Gayur on 21.11.2001 at 12:45 a.m. and found the following injury on the person of the injured-Gayur:-

> (i) Lacerated wound 3.0cm x 2.0cm. x bone deep, left thigh, front 4.0cm above left knee joint with abrasion collar around the wound. No blackening, scorching and tattooing seen around the wound.
>
> The doctor has opined that the injury was fresh in duration. Further the injury was kept under observation and X-ray was advised.

Dr. D.D. Lumba PW6 has also examined Arshad s/o Sayeed on 21.11.2001 at 1:10 p.m. and found the following injuries on the person of the injured :-

> (i) Lacerated wound 1.0cm.x 0.8cm. x depth not probed left clavicular region (above left clavicle)
> (ii) Lacerated wound 1.5cm x 1cm. x depth not probed, left side back upper part.
>
> No blackening, scorching and tattooing seen around both injuries.

The doctor has opined that the injuries were fresh in duration. Further the injuries were kept under observation and X-ray was advised. X-ray report of injured is as follows:-

> *"Radio-opaque shadows of small sized almost round shaped foreign bodies in seen infraclavicular region middle third part & at the level of 5-6 (fifth-6th) ribs of left side chest wall.*
> *Injuries are caused by discharge of firm-arm and simple in nature."*

Dr. D.D. Jumba PW6 has examined Naseem Ahmad s/o Tahir on 21.11.2001 at 1:20 a.m. and found the following injury on his person:-

> (i) Lacerated wound 0.4 cm x 0.4cm x muscle deep, right upper-arm, back lower part. No blackening, scorching and tattooing seen around the wound. Mark of entry present on sleeve of Kurta & Kurta stained with blood.

The doctor has opined that the injury was fresh in duration. Further the injury was kept under observation and X-ray was advised. X-ray report of injured is as follows:-

> "*Ray right upper-arm – A small sized radio-opaque shadow of foreign body is seen on medial side of right upper-arm lower third region."*

Dr. D.D. Lumba PW6 has examined Ashraf s/o Ibrahim on 21.11.2001 at 1:30 p.m. and found the following injuries on the person of the injured :-

> (i) Lacerated wound 0.5cm x 0.4cm x through & through, left lower lip, near midline with abraded swelling on gun (lower left). No blacking, scorching and

tattooing seen around the wound.

(ii) Lacerated wound 0.4cm x 0.4cm x muscle deep, right thigh, outerside, lower half. No blackening, scorching and tattooing seen around wound. Mark corresponding to injury present on 'Tehmat' which is stained with blood.

The doctor has opined that the injuries were fresh in duration. Further the injuries were kept under observation and X-ray was advised. X-ray report of injured is as follows:-

> "*X-ray face. A small sized almost round shaped in radio-opaque shadow of foreign bodies is seen on left side of face left mandibular region.*
> *X-ray Right thigh:- A small sized almost round shaped radio-opaque shadow of foreign body is seen in thigh lower third region.*
> *Injuries caused by discharge of fire-arm & simple in nature."*

Dr. D.D. Lumba PW6 has examined Smt. Mehmuda w/o Gaffor on 21.11.2001 at 1:40 p.m. and found the following injury on the person of the injured:-

(i) Lacerated wound 0.2cm x 0.2cm x muscle deep, right side neck, base, outerside. No blackening, scorching and tattooing seen around the wound.

The doctor has opined that the injury was fresh in duration. Further the injury was kept under observation and X-ray was advised. X-ray report of injured is as follows:-

> *"X-Ray neck region (right side) N.A.D. Hence, injury is caused by hard-blunt object & simple in nature."*

Dr. D.D. Lumba PW6 has examined Iltaaf on 21.11.2001 at 1:45 p.m. and found the following injuries on the person of the injured :-

(i) Lacerated wound 0.2cm x 0.2cm x muscle deep, right side neck, front upper-part. No blackening, scorching and tattooing seen around the wound.

(ii) Three lacerated wound in an area of 7.0cm x 5.0cm x each measuring about 0.2cm x 0.2cm x muscle deep right upper arm, front outer, upper half. No blackening, scorching and tattooing seen around the wound.

(iii) Lacerated wound 0.2 cm x 0.2 cm x muscle deep, left index finger, back px-interphalanged joint.

The doctor has opined that all the injuries were fresh in duration. Further all the injuries were kept under observation and X-ray was advised. X-ray report o injured is as follows:-

"X-ray Neck: A small sized almost round shaped radio-opaque shadows of foreign body is seen in neck at the level of C5-6.
X-ray Right Upper-arm: Small sized almost round shaped radio-opaque shadow of foreign bodies (three in no.) is seen in upper arm region upper third part.
X-ray Left Index finger: A small sized almost round shaped radio-opaque shadow of foreign body is seen at the proximal interphalangeal bone region of index finger just below first I.P. joint.
Injuries are caused by discharge of firearm and simple in nature."

Dr. D.D. Lumba PW6 has examined Qayum s/o Nazim on 21.11.2001 at 1:55 p.m and found the following injury on the person of the injured :-

(i) Lacerated wound 0.4cm x 0.4cm x muscle deep, left thigh inner side middle part. No blackening scorching and tattooing seen around the wound. Corresponding to the injury mark of entry present on part which is stained with blood.

The doctor has opined that the injury was fresh in duration. Further the injury was kept under observation and X-ray was advised.

Dr. D.D. Lumba PW6 has examined Ayub s/o Hakimuddin on 21.11.2001 at 2:05 p.m. and found the following injury on the person of the injured :-

(i) Abraded swelling 4.0cm x 3.0cm, left side chest, middle part. No blackening, scorching and tattooing seen around the wound.

Injury by hard blunt object, simple and fresh in duration

The doctor has opined that the injury was caused by hard blunt object. Further the injury was simple and fresh in duration.

Dr. D.D. Lumba PW6 has examined Israar s/o Nazir on 21.11.2001 at 2:15 p.m. and found the following injuries on the person of the injured :-

(i) Lacerated wound 1.5cm x 0.5cm x through, right mandible near chin. No blackening, scorching and tattooing seen around the wound.

(ii) Lacerated wound 2.0cm x 1.0cm x through & through, left lower lip front. No blackening, scorching and tattooing seen around the wound.

The doctor has opined that the injury No. 1 is communicating with injury No.1 & there is loss of lower right central and lat. Incisor teeth & right cavine tooth. The injuries were kept under observation. The injuries were fresh in duration. X-ray report of injured is as follows.

> *"X-ray Face – Multiple small sized varied shaped radio-opaque shadows of foreign bodies are seen on right side mandibular region (chin area) with missing of Ist, IInd, IIIrd teeth of right lower jaw is seen. Fracture of mandible right medial side is also seen. Hence, injuries are caused by discharge of fire-arm and grievous in nature."*

Dr. D. D. Lumba PW6 has examined Hamid s/o Maqsood on 21.11.2001 at 2:25 p.m. and found the following injury on the person of the injured.

(i) Lacerated wound 2.0cm x 1.0cm x depth not probed, left side chest, 8.0cm below left nipple at about 5'O clock position. No blackening, scorching and tattooing seen around the wound.

The doctor has opined that the injury was fresh. Further, the injury was kept under observation and X-ray advised. X-ray report of injured is as follows:-

> *"A radio-opaque shadow of almost round shaped is seen on the left side of chest at the level of eighth and ninth rib. Hence injury is caused by discharge of fire-arm and simple in nature."*

Perusal of the evidence of Dr. D. D. Lumba PW6 coupled with medical reports and supplementary reports of the injured persons reveals that the injuries sustained by the injured persons were caused by discharge of fire-arms.

14. Now, we have to consider whether the appellants-accused were responsible for causing injuries to the injured and the deceased persons. The prosecution had adduced the evidence of the injured eye-witnesses i.e. Gayur PW1, Sajjad @ kala PW2, Ayub PW3 and Ashraf PW4.

15. The informant Sajjad alias Kala PW2 has stated in his evidence that on the date of the incident his brother Ayub PW3 was working in his field. The accused persons namely Soma, Piyara, Chander and Radha came there and surrounded him, but he made his escape good from there. He further stated that on the same day at about 10:00 a.m. Soma, Piyara, Chander, Radha, Bijandr, Tirath, Nathu, Manga S/o Jai Singh, Rakesh, Pratap, Satish, Salekh, Karan, Manga S/o Lekhram and Sushil armed with licensed guns and country-made pistols came near his house. They abused them and challenged them to come out from the house. On this, the informant and his family members alongwith the villagers tried to pacify them but the accused persons fired indiscriminate gun shots towards his house, due to which Gayur, Ikraar, Qayum, Israar, Ayub, arshad, Ashruff, Iltaaf, Hamid, Naseem and Smt. Mehmuda including Sajjad PW1 sustained gun shot injuries on their persons. Mehroof S/o Naazar

sustained gun-shot injury on his person and he died at the spot. The injured persons were taken to Roorkee hospital for their medical treatment. Sajjad @ Kala lodged the F.I.R. Ex.Ka.1 in the police station on the same day at about 11:45. He has further stated that the injured Ikraar Ali has also died after 4th day of the incident. He has also proved the F.I.R. lodged by him. He has further stated in his evidence that appellants Bijander and Tirath have fired gun shots upon the informant in the matter of Soma's daughter about two years ago from the date of incident and the said case was compromised, due to this reason there was enmity between them. He has further stated that the incident of 'marpeet' took place between sons' of Soma namely Radhe, Pyara and Liyakat son of Noordin about four days ago from the date of incident with regard to the Metador (vehicle) charges and the matter was amicably settled by the complaint party and an incident took place at about 2:00 p.m. on the same day between them due to this reason there was enmity between them.

16. Gayur PW1 has stated in his evidence that he and his family members were in his house. The accused persons namely Soma, Chander, Pyara, Radha, Manga s/o Jai Singh, Rakesh, Manga S/o Lekhram, Karan, Pratap, Satish, Salekh, Sushil, Tirath, Bijender and Nathu came on the road near their house and they started abusing the complainant and challenged them to come out from the house. On this his brother Sajjad @ Kala and other family members including he himself came out from their house. They saw that the accused Nathu, Tirath, Bijender, Radhe, Payara, Manga were

holding the country made pistols in their hands and the rest of the accused were having the guns in their hands. Sajjad and other family member including he himself tried to pacify them but the accused persons fired indiscrimate gun shots towards them out of which Kala, Ikraar, Qayum, Israar, Mehroof, Ayub, Arshad, Ashruff, Iltaaf, Hamid and Smt. Mehmuda including Gayur PW1 himself sustained gun shot injuries on their persons. He has further deposed tat Mehroof died at the spot due to the gun shot injuries fired upon him by the accused. Thereafter, they were taken to the hospital where they were medically examined by the doctor. Later on injured Ikraar also succumbed to his injuries. Auyb PW3 and Ashruff PW4 have narrated the entire incident as stated by Gayur PW1 and Sajjad @ Kala PW2 in their evidence. They have also sustained the injuries on their persons and they have corroborated the evidence of Gayur PW1 and Sajjad @ Kala PW2.

17. Sajjad @ Kala PW2 has lodged the report of the incident. All the injured eye-witnesses have fully supported the prosecution version. The presence of the injured witnesses at the spot cannot be doubted. They have sustained injuries at the time of incident and the prosecution has proved the same.The injured witnesses stand on a higher pedestal than ordinary eyewitness. It is also well settled that the testimony of the injured is sufficient to base the conviction and no further corroboration is required. The presence of the injured witnesses cannot be discarded lightly. There is no doubt about the presence of the injured witnesses. They were cross-examined at length, but nothing could be elicited from their evidence so as to discredit their

testimony. All the injured eye-witnesses remained consistent in their cross examination with regard to the factum of incident. The testimony of an injured witness has its own relevance and efficacy. The fact that the witnesses sustained injuries at the time and place of occurrence lends support to their testimony that the witnesses were Present during the occurrence. {Vide **Narendra Nath Khaware Vs. Parasnath Khaware and others 2003 SCC (Crl) 1144 and State of U.P. Vs. Kishan Chand and others 2004 SCC (Cri) 2013}.**

18. Learned counsel for the appellants contended that there was an inordinate delay in lodging the FIR. It was further contended on behalf of the appellants that the delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. It was further contended that there was also delay in forwarding the FIR to the Magistrate concerned and it was received by the Magistrate very late. It was further contended that if there would have been a prompt report the report should have been received by the Magistrate on the same day or on the next day. The prosecution did not explain the delay in sending the FIR to the court. The FIR has been recorded much later than one shown in the document and as such the very genesis of the prosecution case belies and cannot be relied upon to convict the accused persons. Learned G.A. refuted the contention. The incident took place at about 10am 21.11.2001. Sajjad @ Kala PW1, who was

present at the scene of occurrence, promptly reported the matter to the police at 11:45am on 21.11.2001. The distance between the police station and the place of incident is about 12kms. It has come in the evidence that he went to the police station in a bullock-cart. Thus, there is no delay in lodging the FIR. The prompt FIR thus inspires confidence that it was not the outcome of any consultation or deliberation. So far as the contention regarding the delay in sending the FIR to the Magistrate is concerned, the chick report Ex.ka.47 shows that it was received in the court on 24.11.2001. The entire prosecution case cannot be thrown out on this ground alone if the prosecution has produced reliable evidence to prove the guilt of the accused persons. Perusal of the inquest report Ex.ka.4 prepared on 3:30pm shows that the police has received the information of the crime from the informant Sajjad @ Kala on 21.11.2001 at 11:45am and the crime number has also been mentioned at the top of the inquest report. The I.O. was produced before the court, but he was not asked to explain how the delay occurred in sending the FIR to the Magistrate. It has been held by the Hon'ble Apex Court in **Munshi Prasad Vs. State of Bihar SCC(Cri) 2002 p/175** that:-

> *"13. In support of the appeal, a further submission has been made pertaining to the first information report (FIR). On this score the appellants contended that delayed receipt of FIR in the Court of the Chief Judicial Magistrate cannot but be viewed with suspicion. While it is true that section 157 of the Code makes it obligatory on the officer in*

charge of the police station to send a report of the information received to a Magistrate forthwith, but that does not mean and imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice – if the court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, merely delay, which can otherwise be ascribed to be reasonable, would not by itself demolish the prosecution case. The decision of this Court in Shiv Ram Vs. State of U.P. {1998(1) SCC 149; 1998 SCC (Cri) 278} lends support to the observation as above.

19. The Hon'ble Apex Court has also held in ***State of Karnataka Vs. Moin Patel 1996(8) SCC 167; 1996 SCC (Cri) 632; AIR 1996 SC 3041*** *as below:-*

"16 The matter can be viewed from another angle also. It also already been found by us that the prosecution case that the FIR was promptly lodged at or about 1:30 am and that the investigation started on the basis thereof is wholly reliable and acceptable. Judged in the context of the above facts the mere delay in dispatch of the FIR – and for that matter in receipt thereof by the Magistrate – would not make the prosecution case suspect for as has been pointed out by a three-Judge Bench of this Court in Pala Singh Vs. State of Punjab, the relevant provision contained in section 157 Cr.PC regarding forthwith dispatch of the report (FIR) is really designed to keep the Magistrate

informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give proper direction under section 159 Cr.PC and therefore if in a given case it is found that FIR was recorded without delay and the investigation started on that FIR then however improper or objectionable the delayed receipt of the report by the Magistrate concerned may be, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable."

20. The same view has been taken by the Hon'ble Supreme Court in its latest decision in the case of **Rabindra Mahto & another Vs. State of Jharkhand 2006(3) SCC(Cri)592** that :-

"19. There cannot be any manner of doubt that Section 157 of the Criminal Procedures Code requires sending of an FIR to the Magistrate forthwith which reaches promptly and without undue delay. The reason is obvious to avoid any possibility of improvement in the prosecution story and also to enable the Magistrate to have a watch on the progress of the investigation. At the same time, this lacuna on the part of the prosecution would not be the sole basis for throwing out the entire prosecution case being fabricated if the prosecution had produced the reliable evidence to prove the guilt of the accused persons. The provisions of Section 157 CrPC are for the purpose of having a fair trial without there being any chance of fabrication or introduction of the fact at the subsequent stage of investigation. The cases cited by the learned

counsel for the appellants do not lay down any law that simply because there is a delay in lodging the FIR or sending it to the Magistrate forthwith, the entire case of the prosecution has to be discarded. The decisions rendered by this Court and relied upon by the learned counsel for the appellant would only show that this will be a material circumstances which will be taken into consideration while appreciating the evidence on record."

21. On due consideration of the submission of the parties and perusal of the aforesaid principle of law, we are of the view that the delay in sending the FIR to the Magistrate is not fatal and it cannot be concluded that the FIR has been recorded much later than one as shown in the FIR. Therefore, the contention raised by the learned counsel for the appellants has no force.

22. Learned counsel for the appellants contended that the prosecution has not produced the independent witnesses to corroborate the fact of incident. It was further contended that it has come in the evidence that a large number of people came at the spot and they saw the incident, but they were not produced before the court. It was further contended that the injured eye-witnesses of the prosecution namely, Sajjad @ Kala PW1, Ayub PW2, Ashraf PW4, are interested witnesses as they are related to the deceased persons and there is animosity between the prosecution witnesses and the appellants-accused. It was further contended that due to village enmity they had falsely implicated the appellants. It was contended on behalf of the appellants that the prosecution should have

adduced the evidence of independent witnesses who were also present at the time of incident. Learned G.A. refuted the contention. On due consideration of the submissions of the learned counsel for the parties, we are of the view that although, it is true that the injured eye-witnesses and the deceased were related to each other, but the evidence of injured eye-witnesses cannot be discarded on this ground alone. There is no rule of law or prudence which requires that the evidence of a close relation must be discarded for the simple reason i.e. they are related to each other. By now, it is well settled principle of law that animosity is a double-edged sword. It cuts both sides. It could be a ground for false implication and it could also be a ground for assault. Just because the witnesses are related to the deceased would be no ground to discard their testimony, if otherwise their testimony inspires confidence. In the given facts of the present case, they are but natural witnesses. We have no reason to disbelieve their testimony. Similarly, being relatives, it would be their endeavour to see that the real culprits are punished and normally they would not implicate wrong persons in the crime, so as to allow the real culprits to escape unpunished. In the case of **State of Punjab Vs. Karnail Singh** reported in **2004 SCC (Cri) p/135** the Hon'ble Apex Court has held as under:-

> *"8. We may also observe that the ground that the witnesses being close relatives and consequently, being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh v. State of Punjab reported in AIR 1953 SC 364 in which surprise was expressed over the impression*

which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J., it was observed: (AIR p. 366:-

> *25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. It the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavored to dispel in – Rameshwar v. State of Rajasthan reported in AIR 1952 SC 54 (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."*

Again in the case of **Masalti v. State of U.P. AIR 1965 SC 202** the Hon'ble Supreme court has observed as follows:-

> *"14. .....But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."*

23. So far as the contention that no independent witness was produced is concerned, it has come in the evidence of Sajjad @ Kala PW2 that a large number of

people also came at the spot at the time of incident, but due to mental stress at that time he could not recollect the names of the people who gathered there. It is not always necessary to multiply the evidence of the incident on the same point. It has to be seen what is the quality of the witnesses. It is the quality of the evidence and not the quantity, which is required. If the evidence available on record is otherwise satisfactory in nature and can be said to be trustworthy then increase in the number of witnesses cannot be the requirement of the case. Moreover, it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal cases because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed lot. They are being threatened, intimidated and at the top of all they are subjected to unnecessary lengthy cross-examination. So, the witnesses avoid to come to the court. The evidence of prosecution witnessed is consistent and nothing had been elicited from their cross examination which may render their evidence unreliable. The evidence of the prosecution witnesses is credible and cogent. In view of the above discussions, we do not find any force in the contentions advanced by the learned counsel for the appellants.

24. Learned counsel for the appellants further contended that there was inordinate delay in the medical examination of injured-Sajjad @ Kala. The blood was oozing from his injuries at the time of medical examination, whereas the blood was not oozing from the injuries of other injured persons who were examined by the doctor before the medical examination

of Sajjad. It was further contended that the G.D. of the police station did not reveal that there was any injury on the person of informant-Sajjad @ Kala PW2 at the time of lodging the FIR and in view of this the evidence of Sajjad @ Kala sustaining injury on his person during the incident is doubtful. Learned G.A. refuted the contention. It is pertinent to mention here that Sajjad @ Kala PW2 was medically examined by Dr. Ajay Agarwal PW7 at 4:30pm on the same day. The incident took place at about 10am on 21.11.2001. Sajjad @ Kala PW1, who was present at the scene of occurrence, promptly reported the matter to the police at 11.45am on 21.11.2001. The distance between the police station and the place of incident is about 12kms. It has come in his evidence that he was also present at the time of inspection of the place of occurrence made by the I.O. The police recorded his statement at the place of incident and thereafter he went to the hospital where he was medically examined by the doctor. It is also evident from the evidence that Sajjad @ Kala traveled from one place to another place and as such the blood was oozing from his injury due to strain by moving from one place to another place. Sajjad @ Kala has categorically stated in his evidence that he could not show his injury to Constable Vipin Kumar Kaushik PW11 who was present in the police station. The same fact has been corroborated by Vipin Kumar Kaushik PW11. Therefore, we do not find any force in the contention raised by the learned counsel for the appellants.

25. Learned counsel for ht appellants contended that the appellants armed with guns and country-made

pistol in their hands challenged the complainant party to come out from the house. On this, the complainant party came out from the house. It was further contended that the conduct of the complainant party was unnatural because they have seen the guns/country-made pistols in the hands of appellants and they would have remained in their house. Learned G.A. refuted the contention. The conduct of Sajjad @ Kala PW1 and others was natural to come out from the house when the appellant called them to come out. Thus, every individual reacts on his own way. There is no set of rules of natural conduct. It has come in the evidence that the appellants-accused came near the house of complainant party with deadly weapons and asked them aloud to come out from the house. On this, the complainant and his family members alongwith villagers tried to pacify them. Instead of being pacified the appellants-accused started indiscriminate firing. It cannot be said that the conduct of the complainant party was unnatural. We do not find any force in the contention of learned counsel for the appellants.

26. Learned counsel for the appellants-accused further contended that there are contradictions and exaggerations in the testimony of the prosecution witnesses. Learned counsel for the appellants-accused pointed out certain contradictions in the testimony of the witnesses. Learned G.A. refuted the contention. The learned trial court had dealt this argument in its judgment and held that the contradictions pointed out from the evidence of the prosecution witnesses were not material to discredit the testimony of the witnesses.

We do not find any fault in the approach of the learned trial court. The normal discrepancies in evidence are those which are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected from the normal person. The discrepancy as pointed out by the defence is of no consequence. We have gone through the entire evidence and the contradictions pointed out by the learned counsel for the appellants. It is pertinent to mention here that when a witness appears before the court, sometimes he may not stand the test of cross examination, which may be sometimes, because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at time under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. (vide **Krishna Mochi Vs. Vs. State of Bihar 2002 (6) SCC p/81**)

27. It was further contended on behalf of the appellants that the evidence on record shows that the accused Suma, Piyara, Radha and Chander belong to one family and other accused Bijander, Tirath and Nathu are of other family. The appellant Soma, Piyara and Radha Belong to ‘Jhivar’ community, whereas the other accused persons belong to ‘Chamar’ community. It was further contended that they have no common

cause to join and to commit the offence as charged against them. It was further contended that all the accused persons, who were having their licenced guns in the village, have been falsely implicated in this case. It was further contended that the accused Sushil is the son-in-law of Kulari and he belongs to another village. There was no occasion for the appellant Sushil to come near the place of incident. It was further contended that there is a political rivalry in between the parties. The Gram-pradhan of the village belonged to the muslim community, whereas at one occasion the other community also elect the Pradhan of their community. In view of the above enmity, the entire village has been implicated in the case. Learned G.A. refuted the contention. On the date of incident, Ayub – the brother of informant Sajjad @ Kala went to hi field where the accused persons Soma, Piyara, Chander and Radha came there and surrounded him, but he made his escape good from there. Thereafter, the accused persons came near the house of the informant-Sajjad @ Kalla. The appellant-accused were armed with deadly weapons, such as, guns and country-made pistol and immediately after reaching at the spot the exchange of hot words took place. Thereafter, they started firing upon the complainant party and caused multiple injuries to the complainant party, out of which one Mehroof S/o Naazar died at the spot on account of fire-arm injury. It is also in the evidence that nine persons including Gayur PW1, Sajjad @ Kala PW2, Ayub PW3 & Ashraf PW4 have also sustained injuries on their persons. On a conspectus of various relevant features of the case including the genesis; the nature of the incident; the nature of the weapon

carried by them and apart played by the appellants at the seen of the occurrence reveals a common cause of the appellants to cause the injuries on the persons of the injured or to kill them. It is evident from the prosecution evidence that all the accused persons were present at the spot. It cannot be concluded from the prosecution evidence or from any probability arising from the record that all the accused persons who had arms in the village had been falsely implicated in the case.

28. For the purpose of attracting section 149 IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose. In the case of **Bishna Vs. State of W.B. 2006(1) SCC(Cri) 696** has held that :-

> "63.Mizaji v. State of U.P. 1959 Cri. L.J. 777 it was observed:
>
> "Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly

point to such knowledge on the part of them all."

In **Masalti V. State of U.P., AIR 1965 SC 202,** it was held:-

"17. .....What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of fiv e or more persons actuated by, and entertaining one or more of the common objects specified by the five caluses of section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. ....."

29. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that

object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

30. The Hon'ble Supreme Court in **Bhajan Singh v. State of U.P. 1974 SCC(Cri) 604:-**

> "13. Section 149 IPC constitutes, per se, a substantive offence although the punishment is under the section to which it is tagged being committed by the principal offender in the unlawful assembly, known or unknown, Even assuming that the unlawful assembly was formed originally only to beat, it is clearly established in the evidence that the said object is well knit with what followed as the dangerous finale of, call it, the beating. This is not a case where something foreign or unknown to the object has taken place all of a sudden. It is the execution of the same common object which assumed the fearful character implicit in the illegal action undertaken by the five accused.". The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly.

31. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must

be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and their result therefrom. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object.

32. The Hon'ble Supreme Court has observed in the case of **Masalti Supra,** which is as follows:

> *"15. Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have*

been accepted. This criticism again is not well founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is not doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

16. ……

17. ……. Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly, knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the

punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. ……"

33. The above decision was also followed in the decisions of the Hon'ble Apex Court in **Charan Singh & others Vs. State of U.P. 2004(4) SCC 205, Ram Dular Rai Vs. State of Bihar 2003(12) SCC 352 and Bishna Vs. State of W.B. 2006(1) SCC(Cri) 696.**

34. In the facts and circumstances of the present case, we can safely hold that the appellants reached at the spot with common object to kill the members of the complainant party and they in furtherance of the said common object caused grievous injuries on the complainant party, out of which, two injured died. We have been taken through the evidence and cross examination of the witnesses by the learned counsel for the appellants. After going through the same, we do not find any reason to disbelieve the version of the prosecution witnesses. We are completely in agreement with the findings recorded by the trial court in this regard.

35. The prosecution has proved the motive to commit the murder of the deceased persons and to cause injuries to the other persons. In order to prove the motive, the prosecution had adduced the evidence of Sajjad @ Kala PW2 who has stated in his examination-in-chief as under:-

“bl /kVuk ds djhc nks lky igys lksEek dh yMdh fctsUnz us tcjnLrh vius /kj esa j[k yh FkhA eSaus lksek dk i{k djk Fkk fctsUnz o rhjFk us blh ckr dks ysdj esjs xksyh ekj nh Fkh mldk eqdnek pyk Fkk ftlesa gekjk QSlyk gks x;k Fkk ;g tHkh ls esjs ls jaft’k j[kus yxsA ckn esa lksEek] fctsUnz vkfn lc ,d gks x;s FksA

bl /kVuk ls pkj fnu igys Hkh uwjnhu dk yMdk fy;kdr lksEek dk yMdk jk/ks] I;kjk ds chp esa eSVkMksj ds fdjk;s dks ysdj dgk lquh gq;h Fkh mlesa geus le>ksrk djk fn;k FkkA ftl fnu ;g dgk lquh gq;h mlds vxys fnu Hkh dqN dgk lquh gks x;h Fkh mlesa Hkh chp cpko gks x;k Fkk bl ckr dks ysdj Hkh ;g esjs jaft’k j[kus yxsaA”

Sajjad @ Kalla PW2 had stated in his cross examination as under:-

“esjk eqdnek d`".kiky] fot;iky] fctsUnz] rhjFk ds lkFk pyk FkkA bu fot;iky] fctsUnz rhjFk vkfn usa esjs f[kykQ eqdnek fd;k FkkA ml eqdnesa esa ukftj] ukfte] eSa v;wc o x;wj Hkh eqyfteku FksA esjh ekjihV ds eqdnes dk oknh x;wj FkkA ;g ekjihV ccyh uke dh yMdh ds mij ugh gq;h FkhA ccyh ds cki dk uke udyh gS ysfdu bl yMdh ds dkj.k ekjihV ugha gqbZ FkhA ;g ckr lgh gS fd d`".k vkfn o gekjs eqdnes ftlesa x;wj oknh Fkk dk QSlyk vnkyr esa gks x;k FkkA lksek dh yMdh ftldk uke /;ku ugh gS dh ckcr gh ;g mijksDr eqdnek pyk FkkA ;g dguk xyr gS fd lksek dh yMdh dh ckcr esjk dksbZ eqdnek rhjFk o fctsUnz ds lkFk u pyk gksA jkthukek ckn eqdnek dh QSlyk dh udy nk[ky dj nwWxkA”

Sajjad @ Kalla PW2 had further stated in his cross examination as under:-

“fctsUnz ds lkFk tks eqdnek pyk Fkk mldk vuqeku ljdkj cuke fctsUnz ;k ljdkj cuke rhjFk FkkA eq>s ;kn ugh fd bldk eqdnek uEcj 494@99 Fkk ;k ughA gekjs f[kykQ /kkjk

147] 452] 325] 324] 504] 506 vkbZ lkh lh dk eqdnek ljdkj cuke ukfte ds uke ls pyk FkkA esSa bl eqdnes es eqyfte Fkk A bu nks eqdneksa ds vykok QkStnkjh esa vU; dksbZ eqdnek esjk fctsUnz vkfn ds lkFk ugha pykA bUgh eqdneksa esa lksek eqyfte dh yMdh dk ftdz FkkA ;g dguk xyr gsS fd eqdnek ls lksek dh yMdh dk dksbZ laca/k uk gksA lksek dh yMdh dk bu eqdneks ls laca/k Fkk esSa bl lac/k esa lk{; izLrqr dj ldrk gwWA bu eqdneks esa gekjk jkthukek vnkyr esa gks x;k

FkkA jkthukek gksus ds ckn fctsUnz rhjFk o lksek vkfn ,d gks x;s Fkas ysfdu ;g yksx gels jaftl j[kus yxs Fks ysfdu ge yksxks ls dksbZ yMkbZ ugha gq;hA eq>s /;ku ugha gS fd ;g jkthukek 2001 esa gqvk ;k ughaA”

It is also revealed from the record that Liyakat belongs to the complainant party. It is also in the prosecution evidence that on the date of incident i.e. on 21.11.2001 Ayub – the brother of the informant Sajjad @ Kala went to his field where the accused persons Soma, Piyara, Chander and Radha came there and surrounded him, but he made his escape good from there. Thus, the prosecution has proved the motive for commission of the offence.

36. Assuming for the sake of argument that the prosecution has failed to prove the motive against the appellants. When the eyewitnesses to the occurrence consistently supported the prosecution case, the question of motive would have lost its importance. It is well settled that in order to bring home the guilt of an accused, it is not necessary for the prosecution to prove the motive. The existence of motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution. If the evidence of the witnesses appears to be truthful and convinving, failure to prove the motive is not fatal

to the case for the prosecution. It is also well settled that establishment of motive is not sine qua non for proving the prosecution case. It was held in **Yunus Vs. State of M.P. SCC 2003 (1) p/429:-**

> *"The prosecution in the present case has failed to prove the motive. Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The*
>
> *illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is also well settled law that establishment of motive is not sine quo non for proving the prosecution case."*

The Hon'ble Apex Court has affirmed the above view in **Bhimapa Chandappa Hosamani Vs. State of Karnataka 2007 (1) SCC (Cri) 456).**

37. Therefore, the evidence of the prosecution cannot be discarded only on the ground that there was no motive. We are completely in agreement with the findings recorded by the trail court.

38. It was further contended on behalf of the appellants-accused the according to the site plan the place 'A' indicates from where the appellants-accused fired upon the complainant party and place 'B' shows from where the injured sustained gun-shot injuries. The distance between the points 'A' and 'B' is about 25 paces. Learned counsel for the appellants contended that if the gun-shot would have been fired from the place 'A' to the place 'B' there would not have been tattooing and blackening around the wounds. It was further contended that the blackening and tattooing

would only be possible if the gun shot is fired from a distance of 4-5 ft. It was further contended that if one looks at the sketch map (site plan) on which the place where the deceased/injured are said to have been hit is marked and compares it with the statements of the prosecution witnesses and the medical evidence, it would be extremely improbable for the injuries which were received by the deceased/injured persons to have been caused on that part of the body where it has been actually caused, if the deceased/injured were at the place marked on the map. Learned G.A. refuted the contention. The map itself is not on scale but is merely a rough sketch and therefore one cannot postulate that the spot marked on the map is in exact relation to the places shown in the site plan. The mark on the sketch-map was put by the I.O. who was obviously not an eyewitness to the incident. He could only have put it there after taking the statements of the injured eye-witnesses. The marking of the spot on the sketch-map is really bringing on record the conclusion of the I.O. on the basis of the statements made by the witnesses to him. Thus in our opinion would not be admissible in view of the provisions of Section 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the I.O. that the injured eye witnesses told him that the deceased/injured were at such and such place at the time when they were hit. The sketch-map would be admissible so far as it indicates all that the I.O. saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the I.O. would be inadmissible in view of the clear provisions of section 162 of the Code of

Criminal Procedure as it will be no more than a statement made to the police during investigation. The Hon'ble Supreme Court has held in **State of U.P. VS. Babu 2004 SCC(Cri) 144** that :-

> *"5. A bare perusal of the High Court's judgment goes to show that its approach was rather causal and no effort was made to analyse the evidence. It is to be noted that the High Court did not examine the evidence of PWs 1 and 3 with the required care. Great emphasis was laid by the High Court on the fact that in the site plan the place where the gaslight was found had not been indicated. The site plan is not substantive evidence. The High Court seems to have proceeded on the basis that omission to indicate the location of the gaslight in the site plan was fatal. This Court in* ***Shakti Patra v. State of W.B. 1981 SCC (Cri) 644*** *held that where a prosecution witness testified that he had identified the accused in the light of the torch held by hi, the presence of torch would not be said to be not proved on the ground that there was no mention of the torch in the FIR or in the statement of the witness before the police, when there was testimony of other witnesses that when they reached the spot they found the torch burning. To similar effect is the conclusion in* ***Aher Pitha Vajshi v. State of Gujarat 1983 SCC(Cri) 607.*** *It would be proper to take note of what was stated by this Court in George v.* ***State of Kerala 1998 SCC(Cri) 123****2 regarding statements contained in an inquest report. The statements contained in an inquest report, to the extent they relate to what the investigating officer saw and found are admissible but any statement made therein on*

the basis of what he heard from others, would be hit by section 162 of the Code of Criminal Procedure, 1973 (in short "CrPC"). The position is no different in case of a site plan.

39. In the case of **State of Rajasthan Vs. Bhawani & another 2003 (7) SCC p/291,** the Apex Court has held as under:-

"11. The High Court has extensively relied upon the site plan prepared by the investigation officer for discarding the prosecution case and for this purpose has referred to the place from where the accused are alleged to have entered the nohara, the place from where they are alleged to have fired upon the deceased and also has drawn an inference that the place wherefrom the accused are alleged to have fired upon the deceased, the shot could not have hit the houses on the eastern side of the nohara. Many things mentioned in the site plan have been noted by the investigating officer on the basis of the statements given by the witnesses. Obviously, the place from where the accused entered the nohara and the place from where they resorted to firing is based upon the statement of the witnesses. These are clearly hit by section 162 CrPC. What the investigating officer personally saw and noted alone would be admissible. This legal position was explained in ***Tori Singh Vs. State of U.P. AIR 1962 SC 399*** *in the following words:-*

"A rough sketch map prepared by the Sub-Inspector on the basis of statements made to him by witnesses during the course for

investigation and showing the place where the deceased was hit and also the places where the witnesses were at the time of the incident would not be admissible in evidence in view of the provisions of section 162 CrPC, for it is in effect nothing more than the statement of the Sub-Inspector that the eyewitnesses told him that the deceased was at such and such place at the time when he was hit. The sketch map would be admissible so far as it indicates all that the Sub-

Inspector saw himself at the spot; but any mark put on the sketch map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of section 162 CrPC as it will be no more than a statement made to the police during investigation. Therefore, such marks on the map cannot be used to found any argument as to the improbability of the deceased being hit on that part of the body where he was actually injured, if he was standing at the spot marked on the sketch map."

In view of the above, we do not find any force in the contention of the learned counsel for the appellants.

40. Learned counsel for the appellants-accused lastly contended that the sample of blood stained soil taken from the place of incident was not sent for chemical examination. Learned counsel for the appellants have also pointed out certain short-comings in the investigation. Learned G.A. refuted the contention. On due consideration of the submissions of the parties, we are of the view that non-examination of the blood

stained soil by the chemical examiner does not affect the prosecution version. Omissions which have been pointed out is insignificant. The consequence of cash omission in the investigation is not necessary lead to discredit the main prosecution case if the prosecution evidence inspires confidence and circumstances lead to such a conclusion and the prosecution story rings true. It is well settled position of law that the testimony of the witnesses if found credible and cogent the defect on

the part of the Investigating Officer cannot be taken into account. Even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect. To do so would tantamount to playing into the hands of the investigating officer if the investigation designedly defective. {Reliance placed in **Dhanaj Singh @ Shera and others Vs. State of Punjab 2004 (3) SCC P-654, Chhotu Vs. State of Maharashtra 1997 CRI.L.J 4394 (SC) and Karnel Singh Vs. State of M.P. 1995 CRL.L.J 4173**}. In the case in hand the ocular testimony of the witnesses are credible and cogent. It has further held by the Hon'ble Supreme Court in **Rotash Vs. State of Rajasthan 2007 AIR SCW 44** that :-

> "32. The investigation was not foolproof but then defective investigation would not
> Lead to total rejection of the prosecution
> Case.
>
> 33. In Visveswaran v. State 2003 6 SCC 73, this has held:

> Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that the approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to
>
> the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved."

In view of the foregoing discussion, we are of the view that the contention of the learned counsel for the appellants-accused has no force.

41. In view of the foregoing discussion, we are completely in agreement with the findings recorded by the trial court. Therefore, we are of the view that the prosecution has established the guilt beyond reasonable doubt against the appellants. We find that the leaned trial court has rightly convicted and sentenced the appellants and there is no infirmity in the judgment passed by the trial court.

42. Hence, the appeals are dismissed and the convection and sentences awarded by the Trial court against the appellants are confirmed.

43. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(J.C.S.Rawat, J.) (Rajeev Gupta, C.J.)

Dated 14th June, 2007
LSR